
IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

FLOYD EUGENE MAESTAS,

Defendant.

**RULING ON PARTIAL MOTION TO
QUASH**

Case No. 041906594

Judge Paul G. Maughan

This case is before the Court on Defendant's Partial Motion to Quash. Oral arguments on the motion were heard on July 3, 2006. Defendant was present, as were his attorneys Michael Sikora and Michael Misner. The State was represented by Kent Morgan and John Johnson. The Court has thoroughly reviewed the parties' memoranda, the relevant case law, and all applicable rules and statutory provisions. Moreover, the Court has carefully considered the oral arguments provided by counsel.

Now being fully advised, the Court issues this ruling **GRANTING IN PART AND DENYING IN PART** Defendant's motion to quash the magistrate judge's bindover order. Specifically, the Court finds that Defendant was appropriately bound over on all the aggravating circumstances alleged in the aggravated murder charge, but that the State presented insufficient evidence at the preliminary hearing to support a bindover on the charge of forcible sexual abuse and the forcible sexual abuse component of the aggravated burglary charge.

Procedural History

On October 13, 2004, Defendant was charged with one count of aggravated murder in the death of Donna Bott and one count each of aggravated burglary and forcible sexual abuse against Virginia Chamberlain. A preliminary hearing in the matter was conducted on November 11, 2005. The magistrate judge bound Defendant over on all charges. On April 3, 2006, Defendant filed his motion to quash portions of the magistrate judge's bindover order. The State responded on April 24, 2006 and the parties then each filed supplemental briefing.

Relevant Facts

Donna L. Bott was an elderly woman in her early seventies who resided in a home in Salt Lake City. Virginia Chamberlain is an elderly woman in her mid-eighties who also resides in Salt Lake City. During the late evening hours of September 28, 2004, Defendant and two others, William Irish ("Irish") and Rodney Renzo ("Renzo"), unlawfully entered the home of Ms. Bott. Irish testified that as he was searching the interior of the home for items to steal, he walked past Ms. Bott's bedroom door and observed Defendant on top of Ms. Bott while she lay on her bed. Irish heard a muffled scream and Defendant demanding that she tell him where her money was located and threatening that he would stab or cut her if she did not comply. Moments after Irish observed Defendant on top of Ms. Bott, Renzo testified that he also observed Ms. Bott,

but that she was at that point lying on the bedroom floor next to her bed with a sheet covering most of her body. Renzo further testified that he saw Defendant punching and stomping the mid-section of Ms. Bott's body and that she was not moving. Detective Vic Siebeneck testified that the lifeless body of Ms. Bott was discovered in her home on October 1, 2004. According to Det. Siebeneck, during an examination of the crime scene by Salt Lake City police and Utah State Crime Laboratory personnel, a torn pair of Ms. Bott's underwear was discovered on her bed.

Dr. Todd Grey, the Utah State Medical Examiner, testified that during his autopsy of Ms. Bott's body he found evidence of extensive injuries caused by strangulation and both sharp-force and blunt-force objects. He also discovered a foreign substance in the vagina of Ms. Bott, but his examination of her body revealed no evidence of rape or other vaginal trauma. The evidence of strangulation included bruising on the right front of her neck, hemorrhaging in the underlying muscle, and multiple petechia on her face, in the whites of her eyes, and in the inner lining of her eyelids. Dr. Grey testified that Ms. Bott was alive at the time she was being strangled. The sharp-force injury consisted of a non-lethal stab wound to Ms. Bott's left cheek that was approximately two and one half to three inches deep. Ms. Bott was alive at the time this injury was inflicted.

Dr. Grey testified that Ms. Bott suffered massive blunt-force

injuries. These included bruising of the inner surface of her scalp on both sides of her head, contusions around both of her eyes, a superficial cut beneath the left eye, a cut to her cheek that was independent from the sharp-force injury, extensive scraping and bruising of the skin on the nose, right cheek, and chin, lacerations of the lower lip, bruising and displacement of the teeth that were loosened and driven inwards, bruising over her central chest region, bruising in her lower abdominal region, contusions on her right upper arm, bruising on the back of both her left wrist and right hand, bruising on the upper back and shoulder regions, and abrasions on her posterior right hip region and left knee.

In addition, Ms. Bott also suffered significant internal injuries as a result of the attack against her including fractures of the right fourth, fifth, and sixth ribs, fractures of her sternum, tearing of the sac that contains the heart, a rupture of the heart itself, tearing of the root of the aorta, which is the main artery coming out of the heart, and massive bleeding. Significantly, Dr. Grey testified that the abrasion over the posterior right hip region of Ms. Bott's body was consistent with bruising that might occur had her underwear been forcibly removed. According to Dr. Grey, Ms. Bott was alive while all of the forgoing injuries were being inflicted upon her and that it was the cumulative effect of these injuries that ultimately caused her

death. Additionally, Dr. Grey testified that Ms. Bott suffered wounds to her hands that were consistent with defensive injuries and that she had her hair in her hands, indicating that she had attempted to protect her head during the attack.

After Defendant and his accomplices exited the home of Ms. Bott, they went to the home of Ms. Chamberlain. Renzo testified that he and Defendant forcefully entered the home and found Ms. Chamberlain sitting in a chair in her living room watching television. Defendant grabbed Ms. Chamberlain's t-shirt and pulled it up over her head and demanded to know the location of her purse. Renzo testified that Ms. Chamberlain was screaming while Defendant was yelling at her and that he saw Defendant hit her once. After Defendant and Renzo exited the home, Renzo indicated that he saw Defendant with Ms. Chamberlain's white t-shirt and that there was blood on it. Defendant told Renzo that he took the t-shirt because DNA might be on it that could be discovered by law enforcement.

Summary of the Parties' Arguments

Defendant argues that insufficient evidence was presented at the preliminary hearing to support two of the aggravating circumstances alleged against Defendant in relation to the homicide of Ms. Bott. According to Defendant, the magistrate judge erroneously found probable cause to believe that Ms. Bott was murdered in an especially heinous, atrocious, cruel, or exceptionally depraved manner ("(1)(r) aggravator") or that the

homicide was committed while Defendant was engaged in the commission or attempted commission of forcible sexual abuse against her ("(1)(d) aggravator"). In addition, Defendant also argues that the magistrate judge erroneously found probable cause to believe that Defendant committed the offense of forcible sexual abuse against Ms. Chamberlain. According to Defendant, in light of the magistrate judge's errors, the bindover of Defendant on the (1)(r) aggravator and (1)(d) aggravator as well as the count charging Defendant with the forcible sexual abuse of Ms. Chamberlain must be quashed. The State contends that the magistrate judge properly bound Defendant over on all charges, including all the alleged aggravating factors.

Legal Analysis

I. Applicable Legal Standard

When a motion to quash a bindover is filed, although some deference should be given to the magistrate judge's factual findings, see State v. Wodskow, 896 P.2d 29, 31 (Utah Ct. App. 1995), the district court has the authority to conduct its own review of the bindover order to determine whether, in fact, sufficient evidence was presented at the preliminary hearing for the magistrate judge to find probable cause to believe that the defendant committed the crime as charged. See State v. Humphrey, 823 P.2d 464, 466 (Utah 1991) (district court has "inherent authority and the obligation to determine whether its original

jurisdiction has been properly invoked [and to] . . . conduct its own review of the order."). In determining whether a finding of probable cause by the magistrate judge was justified, the district court judge must apply the same standard of proof to the record of the evidence presented at the preliminary hearing that the magistrate judge was required to apply. This standard mandates that the prosecution "present sufficient evidence to support a reasonable belief that an offense has been committed and that the defendant committed it." State v. Clark, 2001 UT 9, ¶16, 20 P.3d 300. See also State v. Virgin, 2006 UT 29, ¶17, 552 Utah Adv. Rep. 38. To satisfy this standard, the State must "produce 'believable evidence of all the elements of the crime charged.'" Clark, 2001 UT 9 at ¶15 (quoting State v. Emmett, 839 P.2d 781, 784 (Utah 1992)). In addition, the district court judge must view the evidence in a light most favorable to the prosecution with all inferences being resolved in favor of the State. See State v. Pledger, 896 P.2d 1226, 1229 (Utah 1995). "[U]nless the evidence is wholly lacking and incapable of reasonable inference to prove some issue which supports the [prosecution's] claim," Cruz v. Montoya, 660 P.2d 723, 729 (Utah 1983), the district court judge may justifiably conclude that the magistrate judge appropriately found probable cause to bind over the defendant. As noted by the Supreme Court, at the preliminary hearing stage of the case, "the evidence required [to show probable cause] . . . is relatively low because the assumption

is that the prosecution's case will only get stronger as the investigation continues." Evans v. State, 963 P.2d 177, 182 (Utah 1998).

II. Especially Heinous Aggravating Circumstance

In Utah, an intentional homicide is classified as a capital offense if it is committed "in an especially heinous, atrocious, cruel, or exceptionally depraved manner any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death." Utah Code Ann. § 76-5-202(1)(r). Interpreting this language, the Utah Supreme Court has held that an intentional homicide is committed in "an especially heinous, atrocious, cruel, or exceptionally depraved manner" only if the facts demonstrate (1) that the defendant inflicted physical torture, serious physical abuse, or serious bodily injury upon the victim before death, State v. Tuttle, 780 P.2d 1203, 1217, and (2) that any of these forms of abuse were inflicted upon the victim while the defendant was in a depraved mental state. Id. (the abuse is required to reflect a consciousness materially more depraved than that of other persons guilty of murder). Unless there is a convergence of both physical abuse and depraved mental state, the (1)(r) aggravator is not applicable to Defendant's case. Id. at 1218. Moreover, the Court finds that the legislature used the disjunctive term "or" advisedly in crafting the (1)(r) aggravator and, therefore, the State need

only show that one of the following occurred prior to Ms. Bott's death: (1) physical torture, (2) serious physical abuse, or (3) serious physical injury.

A. First Prong

Whether a defendant has inflicted physical torture, serious physical abuse, or serious bodily injury upon a victim prior to death is to a large extent dependant upon the definitions of these terms. The term "physical torture" denotes the intentional infliction of severe or extreme physical pain for various untoward purposes,¹ as opposed to the incidental infliction of pain that accompanies almost any homicide.² "Serious physical abuse" was defined in Tuttle as physical abuse that is "qualitatively and quantitatively different and more culpable than that necessary to accomplish the murder." Id. at 1217. See also Smith v. Commonwealth, 248 S.E.2d 135, 149 (Va. 1978) (defining "aggravated

¹See, e.g., Ark. Code Ann. § 5-4-604(8)(B) ("Torture" is defined as the infliction of extreme physical pain for a prolonged period of time prior to the victim's death.); Idaho Code § 18-4001 ("Torture is the intentional infliction of extreme and prolonged pain with the intent to cause suffering."); N.Y. CLS Penal § 125.27(1)(a)(x) ("Torture" means the intentional and depraved infliction of extreme physical pain."); State v. Morales, 587 P.2d 236, 242-43 (Ariz. 1978) ("The crime of murder by torture requires proof, from either direct or circumstantial evidence, that the defendant possessed the specific intent to cause extreme pain and suffering for the purpose of revenge, extortion, persuasion, or to satisfy some untoward propensity.").

²Although "physical torture" has not been explicitly defined either in the Utah Code or in Utah case law, the Utah Supreme Court has referred to the Hi-Fi Shop murder case as an example of homicides that were committed in a manner that clearly satisfied the "physical torture" portion of the (1)(r) aggravator. See State v. Tuttle, 780 P.2d 1203 (Utah 1989). The evidence in that case showed that, while the victims were alive, the defendants forced them to drink a caustic liquid drain cleaner and covered their mouths with tape to prevent any attempts to expectorate the poison. In addition, one of the victims was raped, another victim, while still alive, had a ball point pen vehemently kicked into his ear and was then strangled with a cord, and all of the victims were shot in the head.

battery" as "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder."). Thus, a person suffers serious physical abuse when the evidence shows that the accused inflicted physical abuse that was qualitatively more severe and quantitatively greater than the physical abuse necessary to simply kill the victim. "Serious bodily injury" is defined by statute as "bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death." Utah Code Ann. § 76-1-601(10).

In the present case, the Court finds that the State offered sufficient evidence at the preliminary hearing to support a finding that Ms. Bott suffered both serious physical abuse and serious physical injury prior to her death. The facts presented show that numerous egregious injuries were inflicted upon Ms. Bott before she died from Defendant beating, stomping, strangling, and stabbing her. These injuries included: (1) a two and one half to three inch deep non-lethal stab wound to her left cheek; (2) bruising on her neck, hemorrhaging in the underlying muscles, and multiple petechia on her face and in her eyes as a result of strangulation; (3) bruising on the inner surface of her scalp; (4) contusions around both eyes; (5) a superficial cut beneath her left eye and a cut to her cheek that was independent of the stab wound; (6) extensive

scraping and bruising of the skin on her nose, right cheek, and chin; (7) lacerations to her lower lip; (8) bruising and displacement of her teeth that were loosened and driven inwards; (9) bruising over her central chest region; (10) bruising to her lower abdominal region; (11) contusions on her right upper arm; (12) bruising on the back of both her left wrist and right hand; (13) bruising on her upper back and shoulder regions; (14) abrasions on her posterior right hip region and left knee; (15) fractures to her right fourth, fifth, and sixth ribs; (16) fractures to her sternum; (17) tearing of the sac that contained her heart; (18) a rupture of her heart; (19) tearing of the root of her aorta, which is the main artery coming out of the heart; and (20) massive internal bleeding.

Dr. Grey testified that the cumulative effect of the injuries suffered by Ms. Bott was death, but that she was alive while all of them were inflicted. It is clear that many of the injuries, such as the numerous bruising wounds, cuts, teeth displacement, and fractures, would not have resulted in death in the short term and would have been extremely painful. Though it is unclear, of course, precisely how long Ms. Bott suffered, it is clear that her death was not instantaneous, but that she likely died during or at the end of the five to ten minute attack. It is also clear that Ms. Bott likely suffered significant pain as a result of the foregoing injuries.

Although the State argues that Ms. Bott was tortured, the Court does not resolve this issue because it is clear that the injuries inflicted fall within the scope of both serious physical abuse and serious bodily injury. First, because many, indeed most, of the numerous injuries suffered by Ms. Bott would not have resulted in death in the short term, and yet likely caused her to suffer significant pain, by definition they are the types of injuries that are qualitatively, as well as quantitatively, different than the types of injuries necessary to accomplish her death. See Tuttle, 780 P.2d at 1217. In addition, these injuries were clearly of the type that would have caused "protracted loss or impairment of the function of any bodily member or organ [and] create[d] a substantial risk of death." Utah Code Ann. § 76-1-601(10). Therefore, the Court finds that Defendant inflicted serious bodily injury upon Ms. Bott and the infliction of these injuries constituted serious physical abuse. For these reasons, the magistrate judge did not err in concluding that the injuries suffered by Ms. Bott satisfied the legal definitions.

B. Second Prong

In addition to showing that either physical torture, serious physical abuse, or serious bodily injury was inflicted upon Ms. Bott prior to death, the evidence must also show that the pre-death abuse occurred while Defendant was in a depraved mental state. Tuttle, 780 P.2d at 1217 (the abuse must reflect a consciousness

materially more depraved than that of other persons guilty of murder). That is, the Court must find that "the form of abuse was demonstrably chosen primarily to torture or maim the victim[] rather than simply to kill [her]." Id. at 1218. A defendant commits an offense while in a depraved mental state if he possesses the "intent to cause wholly unnecessary suffering to the victim[]." Id. at 1218. Whether a defendant possesses such an intent at the time he commits a murder may³ be inferred from the severity and type of wounds inflicted upon the victim. This conclusion is supported by language in Tuttle where the Supreme Court indicated that the facts of the Hi-Fi murder case fell within the ambit of the (1)(r) aggravator precisely because the "physical abuse before death . . . evidence[d] an intent to cause wholly unnecessary suffering to the victims." Tuttle, 780 P.2d at 1218 (emphasis added). Given this language, in combination with the Supreme Court's definition of "depraved mental state," it follows that a finding of physical torture, serious physical abuse, or serious bodily injury before death, all of which are characterized by abuse that is beyond that which is necessary to accomplish an act of

³Unlike physical torture, which includes the intent to cause wholly unnecessary suffering by inflicting severe or extreme physical pain, it is not the case that a finding of serious physical abuse or serious bodily injury before death necessarily entails that either of these forms of abuse were inflicted while the accused was in a depraved mental state. Clearly, such wounds "could in fact have been inflicted in the course of a killing in the heat of passion rather than a calculated torture murder," People v. Steger, 546 P.2d 665, 669 (Cal. 1976), or because the defendant was suffering from a mental disease or defect that substantially impaired his mental, emotional, or behavioral functioning. See Utah Code Ann. § 76-2-305.

murder, may also support a finding that the acts were committed while the perpetrator was in a depraved mental state. See Id. at 1218 n.16 (the United States Supreme Court has "approved the . . . construction of 'depravity of mind' as the mental state for inflicting serious physical abuse before death."). See also People v. Cooley, 211 Cal. App.2d 173, 199 (Cal. Ct. App. 1962) ("An intent that the victim should suffer may be inferred from the condition of the victim's body."), overruled on other grounds by People v. Lew, 441 P.2d 942 (Cal. 1968); Hance v. State, 268 S.E.2d 339, 346 (Ga. 1980) ("the fact that the victim was tortured or was the victim of an aggravated battery will also support a finding of depravity of mind of the defendant."); State v. Williams, 690 S.W.2d 517, 529 (Tenn. 1985) ("In proving that such torture occurred, the State, necessarily, also proves that the murder involved depravity of mind of the murderer, because the state of mind of one who willfully inflicts such severe physical or mental pain on the victim is depraved.").

The Court finds that the second prong is also satisfied. First, without listing again the litany of injuries suffered by Ms. Bott, there is no question that many of them, when viewed individually, were not lethal, and yet likely would have caused Ms. Bott significant physical pain. Second, while it may be true that Defendant did not methodically torture Ms. Bott, he nevertheless used multiple methods to ultimately kill her. Rather than using

means at his disposal to quickly cause her death, such as a lethal stab from the knife in his possession, Defendant simply used the knife to inflict a deep cut on her face. He then went on to strangle and beat Ms. Bott. Third, by severely beating Ms. Bott until she died, Defendant chose a method for causing death that maximized pain and, relative to the methods he could have used, lengthened her suffering. Specifically, Defendant inflicted numerous injuries to Ms. Bott's face and head which would have caused her tremendous pain, without being fatal. In the Court's view, these facts make this case unlike Tuttle, where the defendant simply used the only means at his disposal to cause the victim's death and there was no evidence to show that the defendant had a quicker or less painful method of killing the victim. Therefore, the facts here suggest that Defendant was in a depraved mental state when he inflicted the numerous injuries upon Ms. Bott.

Defendant contends that his case does not fall within the ambit of the (1)(r) aggravator because the evidence does not rise to the level of a horrifying torture-murder. Significantly, Defendant relies upon the notorious Hi-Fi murder case and argues that in that case the intent to cause wholly unnecessary suffering was demonstrated when one of the defendants kicked a pencil into the ear canal of one of the victims. This argument, however, does not support his position that he did not cause the death of Ms. Bott while in a depraved mental state. During his attack upon Ms.

Bott, Defendant unnecessarily inflicted a non-lethal, deep, slicing stab wound on the face of Ms. Bott near her eye. Such conduct is similar in all relevant respects to the conduct he refers to in the Hi-Fi murder case that he contends demonstrates a depraved mental state. In any event, it is not necessary for the Court to find that Defendant's conduct rises to the most egregious level possible in order to find that the (1)(r) aggravator is applicable. The language of the (1)(r) aggravator only requires the Court to find that Defendant inflicted needless suffering upon Ms. Bott, and that condition is satisfied here.

Defendant also argues that the evidence shows violence "that merely escalated" until Ms. Bott was rendered unconscious or killed and, therefore, is not indicative of a depraved mental state. That is certainly one view of the evidence. However, the alternative view espoused by the magistrate judge, who was required to draw all reasonable inferences in favor of the State, is that Defendant inflicted the injuries upon Ms. Bott in a manner that maximized her suffering. Given the legal standard applicable to bindover determinations, it was not error for the magistrate judge to conclude that Defendant was in a depraved mental state at the time he allegedly murdered Ms. Bott.

Because the magistrate judge justifiably concluded that Defendant inflicted serious physical abuse and serious bodily injury upon Ms. Bott and that Defendant was in a depraved mental

state at the time he caused these injuries, it is the Court's conclusion that the magistrate judge did not err in finding that the State properly alleged the (1)(r) aggravator in charging Defendant with aggravated murder in the death of Ms. Bott.

III. Forcible Sexual Abuse

The Utah Criminal Code states that a

person commits forcible sexual abuse if the victim is 14 years of age or older and, under circumstances not amounting to rape, object rape, sodomy, or attempted rape or sodomy, the actor touches the anus, buttocks, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indecent liberties with another . . . with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other regardless of the sex of any participant.

Utah Code Ann. § 76-5-404(1). "[T]his crime contains two elements of intent: 'a general intent to take indecent liberties or touch the anus or genitals of another without that person's permission and the specific intent or purpose to cause substantial emotional or physical pain or to sexually arouse or gratify any person.'" Adams v. State, 2005 UT 62, ¶21, 123 P.3d 400 (quoting State v. Sessions, 645 P.2d 643, 646 (Utah 1982)).

A person's conduct towards another constitutes the taking of indecent liberties when the acts are "of equal magnitude of gravity to those specifically set forth in the [statute]," State v. Kennedy, 616 P.2d 594, 597 (Utah 1980), namely, touching the anus, buttocks, or genitals of another or touching the breast of a

female, even though "the acts are committed in a different way or manner than that set forth in the [statute]." In re J.L.S., 610 P.2d 1294, 1295 (Utah 1980). Nevertheless, the Utah Supreme Court has also held that the language "otherwise takes indecent liberties with another" does not express an intent by the legislature "to take this phrase out of the context of the statute (which is directed to conduct of a more serious nature), and include simple offensive touching as a felony offense." Id. at 1296. In determining whether a person has taken indecent liberties with another, the Court must take into account "all of the facts and circumstances of the case," State v. Peters, 796 P.2d 708, 711 (Utah Ct. App. 1990), including "how intrusive the act was against the victim's person," id., whether there was "an intent to do wrong in a sexual scenario,"⁴ State v. Thatcher, 667 P.2d 23, 24 (Utah 1983), and "any . . . material [fact] which relates to the significance of the defendant's act in terms of its probable consequences and the need to respond with criminal sanctions."⁵

⁴Nowhere in Thatcher does the Utah Supreme Court explain the meaning of the phrase "sexual scenario." A plain reading of the forcible sexual abuse statute suggests, however, that it cannot mean "sexual motivation" or "sexual purpose" as Defendant proposes. If this were the case, then, as the State aptly points out, the "intent to cause substantial emotional or bodily pain" language in the statute would be superfluous. Instead, "sexual scenario" refers to conduct which involves the private parts of the body enumerated in the forcible sexual abuse statute, namely, the anus, buttocks, or genitals of another or the breast of a female. Thus, for example, exposing or touching a person's feet without that person's consent would not involve a sexual scenario (even if motivated by an intent to arouse or gratify sexual desire) because it does not involve touching or exposing private areas of the body as set forth in Section 76-5-404.

⁵Relying upon State v. Peters, 796 P.2d 708 (Utah Ct. App. 1990), the State also argues that the Court should consider five separate factors listed in the case of State v. Bishop, 753 P.2d 439 (Utah 1988). These factors are:

Peters, 796 P.2d at 711.

A. Forcible Sexual Abuse Aggravating Circumstance in the Death of Ms. Bott

With respect to the (1)(d) aggravator alleged against Defendant during the homicide of Ms. Bott, the facts presented at the preliminary hearing indicate that (1) Defendant was seen on top of Ms. Bott while she lay on her bed; (2) a pair of torn underwear was found on Ms. Bott's bed; (3) there was bruising on her body that was consistent with bruising that might occur had her underwear been forcibly removed; (4) a foreign substance was found in the vagina of Ms. Bott; and (5) an examination of Ms. Bott's vaginal area produced no evidence of trauma or rape. When these facts are viewed in a light most favorable to the State and with all reasonable inferences drawn in favor of the State, it is reasonable to infer that Defendant forcibly removed Ms. Bott's underwear at some point during his attack upon her. In light of this reasonable inference, the Court finds two alternatives upon

(1) the nature of the victim's participation (whether the defendant required the victim's active participation), (2) the duration of the defendant's acts, (3) the defendant's willingness to terminate his conduct at the victim's request, (4) the relationship between the victim and the defendant, and (5) the age of the victim.

Bishop, 753 P.2d at 482. It bears noting, however, that even though the Court of Appeals listed these five factors when it was discussing the meaning of "indecent liberties" under Section 76-5-404, Forcible Sexual Abuse, the Supreme Court in Bishop listed these factors in the context of considering the meaning of "indecent liberties" under Section 76-5-404.1, Sexual Abuse of a Child, and clearly stated that these factors are applicable in situations "[w]here young child victims have been involved" Id. (emphasis added). Nevertheless, there appears to be nothing in the opinions of the Utah appellate courts that prevents the Court from considering all of the circumstances surrounding Defendant's alleged criminal conduct, including the factors listed in Bishop and Peters.

which Defendant could be bound over for forcibly sexually abusing Ms. Bott during the course of the homicide. First, it is reasonable for the Court to infer that Defendant touched the anus, buttocks, or genitals of Ms. Bott when he removed her underwear. Because of the nature of underwear and the parts of the body it covers, the Court finds it a likely and reasonable inference that Defendant touched the buttocks or genitals of Ms. Bott when he removed her underwear.

Second, the Court finds that Defendant took indecent liberties with Ms. Bott. Utah case law clearly indicates that actually touching an area of the body proscribed by Section 76-5-404 is not essential for a finding that indecent liberties have been taken. The Utah Supreme Court has expressly held that a person may take indecent liberties with another even though "the acts are committed in a different way or manner than that set forth in the [statute]." In re J.L.S., 610 P.2d at 1295. Because the manner set forth in Section 76-5-404 is touching, it follows that a person may take indecent liberties with another even though the actions constituting the taking of indecent liberties do not involve touching the areas proscribed in the statute, so long as the acts are of equal magnitude or gravity as the proscribed touching. See State v. Bishop, 753 P.2d 439, 481-83 (Utah 1988) (taking indecent liberties found even though defendant did not touch the child victim); State v. Kennedy, 616 P.2d 594, 597 (Utah 1980) (finding

that term "indecent liberties" invokes the doctrine of ejusdem generis and "refers to acts of equal magnitude of gravity to those specifically set forth in the statute."). Thus, even if Defendant did not touch Ms. Bott's private areas, this is not dispositive of whether his actions towards her constituted the taking of indecent liberties because Defendant's act of forcefully removing Ms. Bott's underwear without her consent and exposing her genital area is an act of equal magnitude of gravity as touching the private areas set forth in Section 76-5-404.

In Bishop, the Supreme Court held that inducing a child to remove his own clothing for an illicit photo session, when coupled with the defendant's criminal intent, constitutes the taking of indecent liberties even though no touching occurred. The Court finds that the forceful removal of an elderly women's underwear against her will which exposes her genital area is similar to the prohibited exposure in Bishop and constitutes the taking of indecent liberties. Therefore, based upon the language of Section 76-5-404 and the meaning of "otherwise takes indecent liberties with another" set forth in Utah case law, it is reasonable to conclude that Defendant's actions towards Ms. Bott constituted the taking of indecent liberties under the forcible sexual abuse statute.

In addition, the forcible sexual abuse statute also requires that the taking of indecent liberties with another be done with the

intent to cause substantial emotional or bodily pain and/or to arouse or gratify a person's sexual desire. Because "[i]ntent is rarely susceptible to direct proof," State v. Gutierrez, 714 P.2d 295, 296 (Utah 1986), a finding of intent may legitimately be based upon reasonable inferences drawn from all the facts and circumstances surrounding the case. See State v. Cooley, 603 P.2d 800, 802 (Utah 1979) ("The factfinder, however, is entitled to draw all reasonable inferences from the facts and from the actions of the defendant."). The most obvious fact suggesting Defendant had the intent to cause substantial emotional pain is the act itself which constitutes the taking of indecent liberties, namely, forcefully removing Ms. Bott's underwear against her will. Unlike, removing an elderly female's shoes or gloves without permission in order to expose her feet or hands, forcibly removing an elderly female's underwear against her will is inescapably accompanied by substantial emotional pain and is at least consistent with actions that arouse or gratify a person's sexual desires. Thus, because Defendant's actions against Ms. Bott could not realistically have been committed without causing substantial emotional pain, and because they are consistent with actions that arouse a person's sexual desires, it follows that a reasonable inference may be made from the very act of forcefully removing Ms. Bott's underwear against her will that Defendant intended to cause her substantial

emotional pain and/or to arouse or gratify his sexual desires.⁶

Based upon the foregoing analysis, the Court finds that sufficient evidence was presented at the preliminary hearing to support a reasonable belief that Defendant committed forcible sexual abuse against Ms. Bott. Therefore, it is the Court's conclusion that the magistrate judge did not err in finding that the State properly alleged the (1)(d) aggravator in charging Defendant with aggravated murder in the death of Ms. Bott.

B. Forcible Sexual Abuse Against Ms. Chamberlain

With respect to the offense of forcible sexual abuse committed against Ms. Chamberlain, the facts presented at the preliminary hearing indicate that (1) Defendant entered the home of Ms. Chamberlain and pulled her t-shirt over her head and covering her eyes; (2) Ms. Chamberlain was heard screaming while Defendant demanded that she tell him where her purse was located; (3) Defendant hit Ms. Chamberlain once; and (4) at some point Defendant fully removed Ms. Chamberlain's t-shirt. The Court finds that this evidence is insufficient to support the bindover for forcible sexual abuse of Ms. Chamberlain. First, no evidence was presented from which the Court can reasonably infer that Defendant touched the anus, buttocks, breast, or genitals of Ms. Chamberlain.

⁶This conclusion is also buttressed by the fact that there is no plausible innocent explanation for Defendant's actions in forcefully removing Ms. Bott's underwear. See State v. Adams, 955 P.2d 781, 787 (Utah Ct. App. 1998) (under the forcible sexual abuse statute, the "required intent can be inferred from the fact that no innocent explanation for [the] conduct exists.").

Removing her shirt from behind did not require Defendant to touch Ms. Chamberlain's breasts and makes it unlikely that Defendant did so. Second, the Court cannot infer that Defendant took "indecent liberties" with Ms. Chamberlain. There was no evidence presented regarding whether Ms. Chamberlain was wearing underclothing and the Court cannot infer that she was not. Therefore, the Court cannot infer, as it could with Ms. Bott, that Ms. Chamberlain, was left "exposed" by the removal of her t-shirt. Neither can the Court find any evidence to support the conclusion that Defendant did anything to Ms. Chamberlain that was of equal magnitude to touching the private parts of her body.

Conclusion

For the foregoing reasons, the Court finds that the magistrate judge properly bound Defendant over on all the aggravating circumstances alleged by the State in the aggravated murder charge. However, the Court finds that the State did not present sufficient evidence that Defendant committed forcible sexual abuse against Ms. Chamberlain. Therefore, the Court quashes the bindover on Count 3 and strikes the forcible sexual abuse component of the aggravated burglary charge.

Order

IT IS HEREBY ORDERED that Defendant's motion to partially quash the magistrate judge's bindover order is GRANTED IN PART AND DENIED IN PART.

This Ruling and Order constitutes the final order of the Court. No further order is necessary to effectuate the Court's decision.

DATED this 17th day of July, 2006.

BY THE COURT:

Judge Paul G. Maughan
Third Judicial District Court

Certificate of Delivery

I certify that a true and correct copy of the foregoing Ruling on Partial Motion to Quash was either mailed, faxed, or hand-delivered on the ____ day of July, 2006 to the following:

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